United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7108 OR

B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

P15

-and-

No. 76-7108

CHARLES LONG, et al, individually, etc.

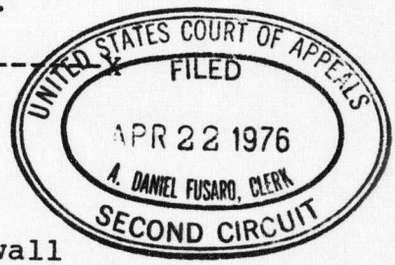
Plaintiffs-Appellees,

-against-

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES OF CANADA, et al,

Defendants-Appellants.

----------X



AMICUS CURIAE BRIEF

For Metropolitan New York Drywall Contractors Association, Inc.

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No. 76-7108

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DRYWALL TAPERS AND POINTERS OF
GREATER NEW YORK, LOCAL 1974,

and

CHARLES LONG, et al.,
individually, etc.,

Appellees

v.

OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION,
et al.,

Appellants

On Appeal from the Order of the United States
District Court for the Southern District of New York
Granting a Preliminary Injunction

AMICUS CURIAE BRIEF

ISSUE PRESENTED

Whether the Order of the District Court signed March 12, 1976 issuing a preliminary injunction, the clear and unmistakable effect of which is to direct employer members of Metropolitan New York Drywall Contractors Association, Inc., none of whom are even parties to this proceeding, to summarily discharge and remove plasterers from the performance of any work involving taping or pointing of drywall surfaces, regardless of whether plaster or adhesive materials are used, and to hire tapers and pointers in their stead on countless building and construction jobsites throughout the Greater Metropolitan New York Area, constitutes an abuse of discretion by the District Court.

STATEMENT OF THE CASE

This case involves an appeal from an Order dated March 12, 1976, signed by Judge Charles M. Metzner of the United States District Court for the Southern District of New York, which Order was stayed by the District Court to March 17, 1976, pending application to the Court of Appeals for a further stay. The Appellants filed their notice of appeal with the District Court and their motion for stay with this Court on March 12, 1976. On March 15, 1976 the Court of Appeals extended the stay until March 23, 1976. On March 16, 1976, Metropolitan New York Drywall Contractors Association, Inc. (hereinafter referred to as "Metropolitan"), by its attorneys, sought to intervene in this case in the District Court by Order to Show Cause but Judge Charles M. Metzner refused to sign the Order to Show Cause on the ground that this case was before the Court of Appeals and the motion to intervene properly should be made there. Metropolitan thereafter sought to intervene in the case in this Court by Order to Show Cause returnable on March 23, 1976. On that date this Court heard argument and further extended the stay until briefs could be filed and argument of the Appellants' appeal could be heard on April 28, 1976. This Court also heard on March 23, 1976 the motion of Metropolitan to intervene. It denied the motion without prejudice, and directed Metropolitan to seek intervention by motion in the District Court in view of Metropolitan's direct and immediate interest in this case. This Court also granted

leave to Metropolitan to file an Amicus Curiae Brief on this appeal.

The Order, in effect, requires Metropolitan to comply with a 1961 Memorandum of Understanding, to which it is not a party, by immediately removing and/or causing to be removed from the performance of any work involving taping or pointing of drywall surfaces (except for any drywall surfaces that are to receive plaster finish, accoustical finish or imitation accoustical finish), at any jobsite or jobsites, wheresoever located, at which such work is being performed or is to be performed, any and all persons presently performing such work who are members of the Appellants or of any subordinate body of any of the Appellants. In addition, the Order, in effect, enjoins Metropolitan, its officers, agents, servants, employees and attorneys and all persons in active concert or participation with any of them from causing, encouraging, advising, counseling or permitting any members of the Appellants or of any subordinate body of any of the Appellants, to perform, or to accept employment to perform the work described above.

On April 14, 1976 Metropolitan moved to intervene in the District Court in this case. The motion is returnable before Judge Charles M. Metzner of the District Court on April 26, 1976.

FACTUAL BACKGROUND

Metropolitan New York Drywall Contractors Association, Inc. is an association of employers in the building and construction industry in the Greater Metropolitan New York Area located at 919 Third Avenue, New York, New York (hereinafter referred to as "Metropolitan"). Metropolitan acts as the collective bargaining agent for its employer members in dealing with various building and construction trade unions, including Operative Plasterers Locals 60, 202 and 852 (hereinafter respectively referred to as "Local 60" "Local 202" and "Local 852"), and Drywall Tapers and Pointers of Greater New York, Local 1974 (hereinafter referred to as "Local 1974"). Locals 60, 202 and 852 are subordinate bodies affiliated with the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (hereinafter referred to as "OP&CMIA"). Local 1974 is a subordinate body affiliated with the International Brotherhood of Painters and Allied Trades (hereinafter referred to as "IBPAT").

Metropolitan is a party to a collective bargaining agreement with Local 1974 governing the terms and conditions of the employment of workers in that trade. R at 114a.[1]

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[1] "R" refers to the Record of the case below as contained in the printed Joint Appendix. Documents, affidavits and exhibits in the Record are identified by reference to page number.

Metropolitan is also a party to a collective bargaining agreement with Locals 60, 202 and 852 governing the terms and conditions of the employment of workers in that trade. The most recent agreement, the text of which has apparently been overlooked by the parties and is not contained in the Record, was entered into on December 1, 1974, for a three year period.

Metropolitan's collective bargaining relationship with Appellants began in the early 1960s, when many employer members of Metropolitan assented to be bound by the National Agreement of the Gypsum Drywall Contractors Association. Not a mere jurisdictional declaration, the agreement described the work covered in practically the same terms used in the December 1, 1974 agreement with Locals 60, 202 and 852.

This agreement was negotiated at arms length between the parties and is designed to provide employees represented by Locals 60, 202 and 852 with reasonable terms and conditions of employment while performing covered work for employer members of Metropolitan. The aggregate wage and fringe benefit package is admittedly slightly lower than provided in the agreement between Metropolitan and Local 1974. However, it should be noted that the fierce competition in the labor market place and the depressed state of the building and construction industry in the Greater Metropolitan New York Area make such negotiated wage and fringe benefit concessions rational and economically sound on the part of Locals 60, 202 and 852 and Metropolitan. The safety conditions specified in both agreements are identical

though tailored to meet the needs of each trade. For instance, "Sta-Smooth", a plaster material, is not an adhesive and contains no asbestos ingredients. R at 129a. There is thus no need to ban the mixing of asbestos-containing materials, to require the use of masks or to prohibit "stilts".

During the course of the negotiations between the Metropolitan and Local 1974 for the current collective bargaining agreement between them, an impasse arose as a result of the demand by Local 1974 that the agreement contain a provision requiring the exclusive hiring of tapers to perform the work which is the subject of this lawsuit. Metropolitan adamantly refused this demand, asserting its right to employ members of other trades when appropriate. This impasse was resolved when James Wolfort, Third General Vice President of IBPAT, who participated in the negotiations, instructed Local 1974 representatives that the employers did indeed have the right to employ members of other unions. The collective bargaining agreement which Metropolitan eventually negotiated and executed with Local 1974 contains no restriction of this right. Metropolitan's collective bargaining agreement with Locals 60, 202 and 852 similarly contains to such restriction.

Metropolitan is not a party to the alleged 1961 Agreement between OP&CMIA and IBPAT (R at 186a) which is the basis of this lawsuit, and is in no way bound by that Agreement. This lawsuit, which purports to involve only the rights of OP&CMIA and IBPAT under the terms of the 1961 Agreement, in fact

materially and directly affects the interests of employer members of Metropolitan and other independent employers.

Since in or about August, 1974, employer members of Metropolitan have assigned the work claimed by Local 1974 in this lawsuit to Locals 60, 202 and 852, pursuant to its collective bargaining agreement with them. As of the date hereof, at least fifty (50%) per cent of the work being done by employer members of Metropolitan is being performed by members of Locals 60, 202 and 852.

The present dispute arose in March, 1975, from an alleged change of assignment of drywall pointing and taping work from members of Local 1974 to members of the Locals 60, 202 and 852 on a project known as Metro North, located in the City, County and State of New York. The general drywall contractor, National Wall Systens, Inc. had contracted with Vincent Colletti & Co., a plastering contractor, to perform the pointing and taping work for buildings Nos. 2 and 3 of the Metro North project. Colletti, an independent employer not a member of Metropolitan, did not have a collective bargaining agreement with the Local 1974, but for many years had had an agreement with Locals 60, 202 and 852. The pointing and taping work performed by plasterers on buildings Nos. 2 and 3 on the Metro North used a plaster material applied with a trowel known as "Sta-Smooth" rather than an adhesive material applied with a knife used by members of Local 1974 on other buildings of the project.

At the time Metropolitan entered into its most recent collective bargaining agreement with Local 1974, jurisdiction over the work in question belonged to Locals 60, 202 and 852. As previously noted, since 1974, a jurisdictional dispute has arisen between Local 1974 and OP&CMIA and Locals 60, 202 and 852 regarding this work. As a result, Local 1974 commenced a proceeding under the terms of its collective bargaining agreement with Metropolitan for resolution of the jurisdictional dispute. A final and binding decision in that case will eventually be issued by the Impartial Jurisdictional Disputes Board, a panel consisting of both employer and union representatives. Metropolitan will, of course, be bound by that decision.

If the preliminary injunction issued by the District Court is permitted to stand, members of Locals 60, 202 and 852 working for employer members of Metropolitan will be required to cease performing services under the terms of the collective bargaining agreement between Metropolitan and Locals 60, 202 and 852. As a practical matter, since the work can only be performed by a limited number of skilled workers, and, since Local 1974 would otherwise assuredly allege violations of its collective bargaining agreement with Metropolitan, employer members of Metropolitan would be compelled to hire workers to perform this work under the terms of the collective bargaining agreement between Metropolitan and Local 1974.

At the present time, many employer members of Metropolitan have entered into binding contracts with general contractors and other builders to perform work for them in the future, based upon

labor costs as set forth in the collective bargaining agreement with Locals 60, 202 and 852. The labor costs which will be incurred if the employers are required to hire members of Local 1974 are substantially higher. If these employer members of Metropolitan are required to employ tapers rather than plasterers they will suffer serious economic losses on these jobs.

It should be noted that all parties in this case have carefully refrained from bringing to the attention of this Court the fact that there have been several threats of violence and a few actual incidents of violence involving members of Local 1974 and Locals 60, 202 and 852. Metropolitan has signed and sworn statements attesting to these threats and incidents and is of the belief that the implementation of the preliminary injunction, involving as it does the removal of hundreds of plasterers from jobsites and the substitution of tapers, will be occasioned by further strife and threats and perhaps serious incidents of violence and bodily injury.

In addition to causing immediate and irreparable injury to plasterers and their families, the preliminary injunction will seriously prejudice other pending litigation involving jurisdiction between Local 1974 and Metropolitan. In one case before the New York State Mediation Board, Drywall Tapers and Pointers of Greater New York, Local 1974 v. National Wall Systems, Inc., Case No. A 75-999, involving potentially substantial damages, Arbitrator Herbert L. Haber has issued a decision which depends entirely on the resolution of the work jurisdiction question presented in this case. It is readily apparent that the issuance of the preliminary in-

junction may constitute an adjudication of the merits and have a direct and immediate effect upon that case. It will, moreover, in effect nullify Metropolitan's collective bargaining agreement with Locals 60, 202 and 852 and, in effect nullify in advance the eventual decision of the Impartial Jurisdictional Disputes Board.

SUMMARY OF ARGUMENT

This case involves an appeal from an Order of the District Court signed March 12, 1976 issuing a preliminary injunction, the clear and unmistakable effect of which is to direct employer members of Metropolitan New York Drywall Contractors Association, Inc., none of whom are even parties to this proceeding, to summarily discharge and remove plasterers from the performance of any work involving taping or pointing of drywall surfaces, regardless of whether plaster or adhesive materials are used, and to hire tapers and pointers in their stead on countless building and construction jobsites throughout the Greater Metropolitan New York Area.

Metropolitan contends that the District Court abused its discretion in several respects. The District Court (i) failed to conduct a hearing to which Metropolitan was a party; (ii) failed to make findings of fact with respect to Metropolitan; (iii) failed to consider and Appellees failed to establish the prerequisites for the issuance of a preliminary injunction, i.e., probable success on the merits, irreparable harm, and balance of interests, and (iv) should have deferred to the administrative procedures established by the parties for the resolution of jurisdictional disputes.

Accordingly, Metropolitan submits the injunctive relief granted by the District Court should be vacated.

ARGUMENT

I. The District Court Abused Its Discretion By Granting A Preliminary Injunction In Its Order Dated March 12, 1976

A. The District Court Failed To Conduct A Hearing To Which Metropolitan Was A Party And Failed To Make Findings Of Fact With Respect To Metropolitan

It is a well established rule in the Second Circuit that where there are disputed issues of fact a temporary injunction should not issue save in instances of extreme urgency. Carter-Wallace Pharmacal Co. v. Davis-Edwards Pharmacal Co., 443 F.2d 867, 872 (2d Cir. 1971); SEC v. Frank, 388 F.2d 486, 490-493 (2d Cir. 1968); Cerruti, Inc. v. McCrory Corp., 438 F.2d 281, 284 (2d Cir. 1971); Guardians Association of New York City Police Department, Inc. v. Civil Service Commission of the City of New York, 490 F.2d 400, 403 (2d Cir. 1973).

Where, as here, there are disputed issues of fact, conflicting affidavits and exhibits are not a sufficient basis for the issuance of a preliminary injunction. In the present case, Metropolitan is not a party to the 1961 Memorandum of Understanding between OP&CMIA and IBPAT (R at 186a), yet the District Court's granting of the preliminary injunction is based upon the Memorandum's alleged viability. Inasmuch as the Memorandum may have been abrogated in writing or by action by one or both of OP&CMIA and IBPAT, the District Court should have held some form of evidentiary hearing allowing the presentation of testimony.

The within action was commenced in late August 1975, and the District Court heard argument on Local 1974's initial motion for a preliminary injunction on October 3, 1975 and denied the motion one month later. For a period of three months thereafter the case lay dormant. No request was made by Local 1974 for a temporary restraining order. No showing was made of an immediate need for injunctive relief. No evidentiary hearing was held; no testimony was presented. The District Court did not hear testimony from Metropolitan that its employer members make the work assignments in issue by reference to the May 19, 1947 Decision of Record contained in the "Green Book". R at 243a. The District Court did not hear testimony that Metropolitan has a direct and substantial interest in the issues raised in this case and its employer members are so situated that the granting of the preliminary injunction will as a practical matter cause serious economic injury. Apparently, the situation at that time was such as not to require an evidentiary hearing or the granting of injunctive relief.

However, one year after the work assignment dispute arose, seven months after the action was commenced, and four months after the denial of the initial motion for injunctive relief, the District Court found sudden urgency in Local 1974's renewed motion for a preliminary injunction. Without giving the parties involved and the party (Metropolitan) directly and immediately affected by the preliminary injunction the opportunity to present evidence, the District Court blithely issued its Order of March 12, 1976 by construing the oral argument of October 3, 1975 on the initial motion to be a "hearing".

The seminal opinion of Judge Biggs of the Third Circuit in Sims v. Greene, 161 F.2d 87 (3d Cir. 1947) is instructive and sets forth the standards against which the actions of the District Court must be measured. Though the Second Circuit has not yet given full sway to the principles enunciated and followed in the Third Circuit, Metropolitan respectfully submits that the broader view of the Third Circuit is the more equitable one and should be applied herein.

> The issuance of a preliminary injunction under such circumstances is contrary not only to the Rules of Civil Procedure but also to the spirit which imbues our judicial tribunals prohibiting decision without hearing. Rule 65(a) provides that no preliminary injunction shall be issued without notice to the adverse party. Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not only by one side to a controversy. It should be pointed out also that Subsection (b) of Rule 65 provides that a motion for a preliminary injunction 'shall be set down for hearing ****' and speaks of the motion coming on for 'hearing'.
>
> It is also pertinent to observe that the predecessor to Rule 65 was Equity Rule 73, 78 U.S.C.A. §723 Appendix, and that this rule was copied in haec verba from Section 17 of the Clayton Act, 28 U.S.C.A §381. It has never been supposed that a temporary injunction could issue under the Clayton Act without giving the party against whom the injunction was sought an opportunity to present evidence on his behalf. The theory of Rule 65, of Equity Rule 73, and of Section 17 of the Clayton Act, is that the trial judge may issue a temporary restraining order to preserve the status quo; that the order may endure for twenty days but for no longer without the consent of the party against whom it issued; that within the twenty day period, which affords the opportunity for hearing, such facts must be presented to the court as will justify the tribunal, in the exercise of its sound discretion, to issue a preliminary injunction.

> If anything more was required to indicate with certainty that a preliminary injunction may not issue without giving the party sought to be enjoined an opportunity to present evidence on his behalf, it is furnished by the provisions of Rule 52(a) which requires the court, in all actions 'tried upon the facts without a jury' to state separately its conclusions of law 'in granting or refusing interlocutory injunctions' 'similarly (to) set forth findings of fact and conclusions of law which constitute the grounds of its action'. The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence. Finding facts requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both. Sims v. Greene, supra at 88-89

See also Dopp. v. Franklin National Bank, 461 F. 2d 873, 879 (2d Cir.1972); United States Steel Corporation v. United Mine Workers of America, 456 F.2d 483, 487 (3d Cir. 1972); Consolidation Coal Co. v. Disabled Miners of Southern West Virginia, 442 F. 2d 1269 (4th Cir. 1971); Hawkins v. Board of Control, 253 F.2d 752 (5th Cir. 1958); Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc., 446 F.2d 353, 356 (5th Cir. 1971); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 513 (E.D. Pa. 1972).

In the case at bar there are three parties or sides to the controversy, i.e., Appellees, Appellants and Metropolitan, and even if it is found that a hearing was had, the fact remains that only two of the three parties or sides were participants able to present and controvert evidence. It was the view of the Fourth Circuit in an analogous situation that

> As we view the record, we can only conclude that for practical purposes plaintiffs obtained an ex parte preliminary injunction in a case in which there was sharply disputed questions of fact and of law. This was manifestly error, because Rule 65(a)(1) is explicit. Consolidation Coal Co. v. Disabled Miners of Southern West Virginia, supra at 1269.

The request herein for a preliminary injunction was addressed to an ambit of discretion which was abused by the District Court. It is respectfully submitted that the District Court's Order of March 12, 1976 must be reversed or, alternatively, the injunctive relief should be stayed and the case should be remanded for an evidentiary hearing to be held by the District Court only after it grants Metropolitan's motion to intervene.

B. The District Court Failed To Consider And Appellees Failed To Establish The Prerequisites For The Issuance Of A Preliminary Injunction

It is an accepted rule that a party wishing to establish its right to a preliminary injunction must demonstrate either a probability that it will succeed on the merits coupled with a threat of irreparable injury, or a balance of hardship decidedly in its favor together with a serious question regarding the merits of the underlying action. These variables are dependent. If, for example, a party can show a great probability of ultimate success on the merits, then the severity of harm which need be demonstrated might decrease. But where, as here, the injury produced by a preliminary injunction would be great, a party must demonstrate more persuasively the likelihood of irreparable injury and of success on the merits.

The District Court's failure to consider applicable equitable principles before issuing an injunction is tantamount to an abuse of discretion justifying reversal of the Court's Order of March 12, 1976. Huber Baking Co. v. Stroehmann Bros.Co., 208 F.2d 464, 467 (2d Cir. 1953). It fails to address itself to the prerequisites for the issuance of a preliminary injunction and fails to make any findings of fact. It is impossible to discern the bases upon which the District Court found Appellees entitled to injunctive relief. There are no specific findings of fact with respect to each of the prerequisites as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

Yet such findings are important in cases which involve the resolution of issues of fact based only upon conflicting affidavits. While the District Court does refer to the likelihood of Appellees' success on the merits of their claim based on the 1961 Memorandum of Understanding, the District Court also admitted there were issues of fact relating to the present viability of the Memorandum. More importantly, Metropolitan is not a party to the Memorandum and is not bound by its terms.

Appellees have not established the prerequisites for the issuance of a preliminary injunction: a likelihood of success on the merits, the irreparability of harm if relief is not granted, the balancing of hardships between the parties, i.e., greater harm to Appellees by the denial of an injunction than to Appellants by the granting, and the lack of harm to the public interest, e.g., Metropolitan's, by the granting of relief. A preliminary injunction is an extraordinary remedy, and should not be granted except upon a clear showing. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423 (1974); Stamicarbon N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974); American Brands, Inc. v. Playgirl, Inc., 498 F.2d 947, 949 (2d Cir. 1974); Charlies Girls, Inc. v. Revlon, Inc., 483 F.2d 953 (2d Cir. 1973); Citizens for Better Environment, Inc. v. Nassau County, 488 F.2d 1353 (2d Cir. 1973);

Pride v. Community School Board of Brooklyn, New York, District #18, 488 F.2d 321, 324-325 (2d Cir. 1973); Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687 (2d Cir. 1973); Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 466 F.2d 743 (2d Cir. 1972); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Clairol, Inc. v. Gillette Co., 389 F.2d 264, 265 (2d Cir. 1968); Dino deLaurentiis Cinematographica S.p.A. v. D - 150 Inc., 366 F.2d 373 (2d Cir. 1966).

1. Probably Success on the Merits

In this case, the record, though voluminous, is not sufficient to support a determination that Appellees are likely to succeed on the merits of their claim. For example, the 1961 Memorandum of Understanding may have been abrogated; Appellees may have failed to comply with their agreement to arbitrate their jurisdictional dispute with Appellants in accordance with the National Plan; the BTEA decision of June 12, 1975 holding "Sta-Smooth" to be a plaster material and assigning drywall pointing and taping work involving "Sta-Smooth" to persons represented by Appellants may be dispositive; Appellees may have failed to exhaust their union remedies; the rights and interests of Metropolitan and

its employer members have not yet been considered. Appellees have not met their burden of establishing probable success on the merits.

2. Irreparable Harm and Balancing of Interests

The preliminary injunction issued by the District Court will, in effect, direct employer members of Metropolitan to summarily discharge and remove from their jobsites in the Greater Metropolitan New York Area plasterers represented by Appellants who are performing drywall pointing and taping work, and to hire tapers represented by Local 1974 in their stead. Metropolitan contends that the relief fashioned by the District Court drastically alters the status quo and grants Appellees relief beyond the scope of their interests.

A preliminary injunction is interlocutory, provisional, and is intended to preserve the parties in their respective positions pending a final determination on the merits. Preservation of the status quo may be viewed as the last uncontested status which preceded the pending controversy. A preliminary injunction will not lie where such a grant would effectively provide all the relief sought at trial. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). See also, Sanders v. Air Line Pilots Association, International, 473 F.2d 244 (2d Cir. 1972); National Association of Letter Carriers v.

Sombrotto, 449 F.2d 915 (2d Cir. 1971); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969); Unicon Management Corp. v. Koppers Co., 366 F.2d 199, 204 (2d Cir. 1966); Societe Comptoir De L'Indus. etc. v. Alexander's Department Stores, Inc., 299 F.2d 33, 35 (2d Cir. 1962); Heldman v. United States Lawn Tennis Association, 354 F. Supp. 1241 (S.D.N.Y. 1973).

Appellees requested in their Complaint that Appellants be restrained from asserting jurisdiction over work involving drywall pointing and taping in violation of the 1961 Memorandum of Understanding. They did not seek to require Appellants to remove their members from any jobsite. They also did not seek to require Metropolitan to hire only members of Local 1974 whenever work involves drywall pointing and taping. The District Court, however, granted relief to Appellees beyond that which they requested in their Complaint.

Since the signing of the collective bargaining agreement with Locals 60, 202 and 852 on December 1, 1974, Metropolitan has assigned drywall pointing and taping to plasterers whenever plaster materials have been used. Metropolitan and its employer members have agreed to be bound by and to operate in accordance with the jurisdictional rulings of the BTEA in conformity with the New York Plan for the Settlement of Jurisdictional Disputes. On June 12, 1975 the BTEA ruled that:

> . . . Sta-Smooth, used for Pointing, Taping and Filling, application of.
>
> Tapers Union Local 1974 vs. Plasterers Union Local 60 -- Metro North, 101st St. and East River Drive, Buildings No. 3 and 4, New York City.

> The Executive Committee finds that the material (Sta-Smooth) used for Pointing, Taping and Filling of joints on drywall is a plaster material and is the work of the Plasterers -- Decision of the Executive Committee, June 11, 1975.

Until reversed by the Impartial Jurisdictional Disputes Board under the National Plan, this ruling is binding upon Metropolitan and its employer members under the New York Plan. The vacatur of the BTEA decision by the New York Supreme Court on procedural grounds and the direction to hold a rehearing by the BTEA cannot be said to require a reassignment of work by Metropolitan and its employer members in violation of its collective bargaining agreement with Locals 60, 202 and 852, and is contrary to the work definition contained in the May 19, 1947 "Green Book" Decision of Record.

Except for conclusory allegations to the effect that Appellees will "suffer grievous and material injury irreparable at law and will continue to suffer such injury unless this Court otherwise orders" set forth in an affidavit attached to Appellee's moving papers, and the bald assertion on oral argument before this Court on March 23, 1976 that at most sixteen plasterers will lose their jobs as a result of the District Court's issuance of a preliminary injunction, Appellees have not shown irreparable harm if injunctive relief is denied. Because there was no evidentiary hearing, the parties have been forced to argue the irreparable harm and balancing of interest factors on appeal although they should have been determined initially in the District Court.

Metropolitan has a substantial interest in not having an injunction issue. It is an association of drywall contractors located throughout the City of New York and Nassau, Suffolk and Westchester Counties. At the present time, the following employers are members in good standing of Metropolitan:

NAME OF EMPLOYER MEMBERS	ADDRESSES
Albee Drywall	184 Farnum Boulevard Franklin Square, N. Y. 11010
A & M Wallboard Inc.	2508 Coney Island Avenue Brooklyn, N. Y. 11223
Approved Drywall Corp.	4006 Avenue J Brooklyn, N. Y. 11210
Benson Drywall	9704 Third Avenue Brooklyn, N. Y. 11209
Central Furring & Drywall Inc.	125 Parkway Road Bronxville, N.Y. 10708
Cord Wall Construction Co., Inc.	99 Powerhouse Road Roslyn Heights, N.Y. 11577
Curtis Drywall Corporation	47-21 35th Street Long Island City, N.Y.
De-Jil Systems, Inc.	10-76 Jackson Avenue Long Island City, N.Y. 11101
Denart Construction (Penn Const.)	505 East 75th Street New York, N. Y. 10021
D. T. Drywall Partitions, Inc.	50 Coolidge Avenue Rye, N. Y. 10580
Dyker Drywall	1279 79th Street Brooklyn, N. Y. 11228
East Hills Construction Co., Inc.	850 Conklin Street Farmingdale, N. Y. 11735
Finished Rite Construction Corp.	1750A Goldback Avenue Ronkonkoma, N. Y. 11779

NAME OF EMPLOYER MEMBERS (Contd.)	ADDRESSES
Graphic Building Systems	909 Third Avenue New York, N. Y. 10022
M & R Sheetrock & Taping Corp.	35 Seamen Avenue Rockville Centre, N.Y. 11570
National Wall Systems	8 Industrial Avenue Upper Saddle River, N.J. 07451
New York Wallboard	161 Suffolk Street New York, N. Y. 10002
Orbit Drywall Inc.	10 Neptune Avenue Brooklyn, N.Y. 11235
Prince Carpentry Corp.	115 East 57th Street New York, N.Y. 10022
Ronsco Construction Co., Inc.	1744 Second Avenue New York, N.Y. 10028
Stonehill Sound Control	527 Madison Avenue New York, N. Y. 10022
Superior Drywall	229 Harrison Avenue Harrison, N. Y. 10528
Tabb Drywall Systems	3208 Amboy Road Staten Island, N.Y. 10306
Valdini Drywall Corp.	75 Cabot Street West Babylon, N.Y. 11704
Vidar Drywall Corp.	29-28 41st Street Long Island City, N.Y. 11101
Wolff, Bernie Construction Corp.	65-42 Fresh Meadow Lane Flushing, N. Y. 11365

In affidavits furnished this Court, Appellants state that in New York City alone there are at least 213 plasterers who will lose their jobs as a result of the Order of the District Court. Because computations of plasterers employed at jobsites vary daily, it is submitted that a more fruitful inquiry is the

number of "man hours" employed at sites throughout the Greater Metropolitan New York Area by employer members of Metropolitan. As of the date of this Amicus Curiae Brief, Metropolitan has not yet received replies from most of its employer members as to these computations. The following list of jobs and man hours involving pointing and taping by plasterers using plaster materials is based on information received from only five of Metropolitan's employer members: it indicates the irreparable, immediate and substantial harm which will result if the District Court's issuance of a preliminary injunction is upheld:

BUILDER	JOB SITE AND ADDRESS	APPROXIMATE NUMBER OF MAN HOURS
*	Manor Nursing Home Brooklyn, N. Y.	840
*	Ocean Promenade Rockaway Park, N. Y.	805
*	Rockaway Nursing Home Edgemere, N. Y.	1,085
*	Kingsboro Community College West College Hall Sheepshead Bay, N. Y.	3,080
*	Metro North Housing East River Drive, N. Y.	17,000
*	Hebrew Home for the Aged New Rochelle, N. Y.	1,400
*	Diwa Bank 140 Broadway New York, N. Y., 33rd Fl.	434
*	Whitehill Agency 111 John Street New York, N. Y., 3rd Fl.	266

* Unavailable

BUILDER (Contd.)	JOB SITE AND ADDRESS	APPROXIMATE NUMBER OF MAN HOURS
*	N.Y.S. Urban Development 1345 Sixth Avenue New York, N. Y., 46th Fl.	28
*	Prerau Title 375 Park Avenue New York, N.Y., 35th Fl.	56
*	Weeden Company 25 Broad Street New York, N.Y., 9th Fl.	70
*	Otis Elevator World Trade Center New York, N.Y., 7th Fl.	49
*	U.S.S.R. Embassy 280 Park Avenue New York, N.Y., 3rd Fl.	35
*	Government of Israel 11 West 40th Street New York, N. Y., 17th Fl.	140
*	Learning Corp. 1350 Avenue of the Americas New York, N.Y., 22nd Fl.	42
*	Schroder Bank 1 State Street New York, N. Y., Main Fl.	364
*	Day Care Center 346 13th Street Brooklyn, N.Y.	434
*	Mott Haven Infill 138th & 139th Streets Willis Ave. & Brook Ave. Bronx, N. Y.	3,682
*	Palm Beach Adult Home Emmons Ave. & Knapp St. Brooklyn, N. Y.	1,820
*	Greenside Shopping Center Richmond Avenue Staten Island, N. Y.	350

* Unavailable

BUILDER (Contd.)	JOB SITE AND ADDRESS	APPROXIMATE NUMBER OF MAN HOURS
All Building	Kheel Tower **	2,500
Minskoff Const.	Park East Day School **	900
John Mee, Inc.	South Bronx OUB Houses **	10,000
Kraus Enterp.	Aldus Green Houses **	12,000
John Mee, Inc.	Pleasant East Rehab.**	4,000
H. L. Lazar Inc.	J. C. Penney 1301 6th Avenue New York, N. Y.	525
Diesel Construction Corp.	Office Building 55 West 125th Street New York, N. Y.	420
Jack Resnick & Son Inc.	Office Building 50 West 23rd Street New York, N. Y.	420
Excelco Associates	Store 863 Third Avenue New York, N. Y.	70
Rudin Management Inc.	Office Building 80 Pine Street New York, N.Y.	140
Winsco Construction Corp.	Remeeder Housing Georgia Ave. & Sutter Ave. Brooklyn, N. Y.	4,200
Glick Construction Corp.	Apartment Building 106th St. & 5th Ave. New York, N. Y.	27,300
C & Z Builder Corp.	Apartment Building 130 West 67th Street New York, N. Y.	7,875
Blitman Construction Corp.	Kent Village Division Ave. & Wythe Ave. Brooklyn, N. Y.	28,000
Winsco Construction Corp.	Site 117 Williams Avenue Brooklyn, N. Y.	13,650

** Address Unavailable

BUILDER (Contd.)	JOB SITE AND ADDRESS	APPROXIMATE NUMBER OF MAN HOURS
E. W. Howell Co.	School P.S. 398 Rutland Rd. & East 94th St. Brooklyn, N. Y.	5,250
Diesel Construction Corp.	Maimonides Hospital 48-02 10th Avenue Brooklyn, N. Y.	700
Turner Construction Co.	Lutheran Hospital 150 55th Street Brooklyn, N. Y.	18,200
Walsh Construction Co.	Sutro Building 120 West 106th Street New York, N. Y.	2,800
Diesel Construction Corp.	Celanese Building 1201 Sixth Avenue New York, N. Y.	5,250
Rose Associates	New York Magazine 40th St. & 2nd Ave. New York, n. Y.	1,120
E. W. Howell Co.	A. T. & T. Building Queens Blvd. Rego Park, N. Y.	6,125
H. L. Lazar Inc.	Spanish Tourist Office 665 Fifth Avenue New York, N.Y.	315
Turner Construction Co.	U.N.D.C. Hotel 44th St. & 1st Ave. New York, N. Y.	30,625
Tishman Realty & Construction Co.	World Trade Center Southeast Plaza Liberty St. & Church St. New York, N. Y.	14,560

The impact of the preliminary injunction will irreparably affect employer members of Metropolitan. The Order of the District Court indicates an obvious lack of consideration for the interests of the employers of Appellants. The summary discharge and removal of plasterers from jobsites contemplated by the District Court's Order will, without doubt, be occasioned by a substantial work reduction and disruption of the jobsite itself. As this Court is aware, construction projects involve extremely tight completion schedules which, if interrupted, trigger the payment of liquidated damages by the contractor causing the delay. Delays will also be occasioned by contractors who are compelled to seek replacements for the discharged workers. More importantly, employer members of Metropolitan have entered into binding contracts with general contractors for work to be performed in the future, for prices based upon labor costs as provided in Metropolitan's collective bargaining agreement with Locals 60, 202 and 852, which costs are substantially lower than those which would be incurred if this work were to be performed by members of Local 1974. Serious economic loss will be suffered by these employer members of Metropolitan if higher priced tapers and pointers must be hired instead of plasterers.

In addition to the above, employer members of Metropolitan have in the past year and one quarter greatly increased their use of "Sta-Smooth" in drywall pointing and

taping. They have found "Sta-Smooth," a plaster material, produces better results than any of the adhesive material and is more efficient and economical. Application of "Sta-Smooth" is done by trowel and it is the belief of Metropolitan's employer members that the greater skill of a plasterer is required.

The impact of the preliminary injunction extends far beyond the losses which will be sustained by employer members of Metropolitan. The discharged plasterers will be unable to obtain other employment, particularly in light of the depressed state of the building and construction industry. Many workers will have to join the public welfare rolls to provide food and shelter for their families. Personal financial defaults may occur, mortgages may be foreclosed and health and welfare benefits will certainly be lost. These consequences could never be rectified by a later lifting of the injunction. The $25,000 bond set by the District Court barely covers one quarter of the salary loss which would be occasioned every week the injunction is in effect (213 workers X $11.20 per hour in wages and fringe benefits X 40 hours = $95,400 per week).

C. The District Court Should Have Deferred To The Administrative Procedures Established By The Parties For The Resolution Of Jurisdictional Disputes

The District Court's Order of November 5, 1975, found a sophisticated administrative structure extant between the parties that would obviate the need for recourse to court action, and it therefore fashioned a directive to overcome any obstacles and to implement the administrative procedures for the resolution of jurisdictional disputes between the parties. Metropolitan contends that the District Court's Order of March 12, 1976 abandons this approach and that the District Court should have continued to defer to the administrative procedures established by the parties for the resolution of the jurisdictional disputes in issue in this case.

In this case, Appellees are contractually bound to resolve their dispute with Appellants in accordance with specific arbitration procedures set forth in the National Plan. However, Appellees did not seek an order of the District Court to compel arbitration of their dispute. Rather, Appellees requested relief they should have sought under the procedures of the National Plan. If injunctive relief should be issued, it should have been to compel arbitration. Apparently, Appellees are seeking relief from the District Court, i.e., an injunction specifically enforcing the 1961 Memorandum of Understanding, which they do not believe can be obtained pursuant to the arbitration procedures in the National Plan.

> The policy to be applied in enforcing grievance arbitration provisions in collective agreements is the policy reflected in our national labor laws to promote industrial stabilization through the collective bargaining agreement. United Steel Workers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, 46 LRRM 2416 (1960). The enforcement of arbitration agreements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism. Plasterers, supra, 92 S.Ct. at 370, 78 LRRM at 2903. Congress has by §301 assigned courts the duty of determining whether a promise to arbitrate has been breached, and the judicial inquiry is confined to whether the reluctant party agreed to arbitrate. Warrior and Gulf, supra. However, the policy behind §301 is to "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess. 17. Congress sought to place sanctions behind these agreements because they were the preferred method of settling disputes. See Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed2d 474, 50 LRRM 2440 (1962).
>
> Iron Workers, Local 395 v. Carpenters, 347 F. Supp. 1377 (N.D. Ind. 1972)

See also, National Labor Relations Board v. Plasterers' Local Union No. 79, 404 U. S. 116 (1971).

Metropolitan has a direct and substantial substantive interest in the assignment of work dispute and fundamental fairness requires that any method for resolving the dispute over the work assignment must provide for the right of the employer meaningfully to participate in the dispute-settling process.

The notion that a party with a direct interest in a

controversy is entitled to be heard in the settlement of that controversy is basic to the concept of fair procedure, and is reflected, for example, in our procedural rules dealing with multiparty jurisdiction, especially the rules of intervention and in the law of res judicata. 71 Harv. L. Rev. 874.

While the parties are obligated to arbitrate only what they have agreed to arbitrate, United Steelworkers v. Warrior & Gulf, 363 U.S. 574 (1960), it is settled law that where, as here, the parties have established administrative procedures for the resolution of jurisdictional disputes, the policy of the courts, and of the Congress, in fashioning federal labor law legislation, is to defer mechanisms.

The parties have a National Plan which provides for an administrative decision of the very question which Appellees have asked the Court to determine. If the Court interferes in this dispute, the procedures for resolution of work assignment disputes in the construction industry contained in the National Plan will be undermined and soon abandoned. Jurisdictional questions are best handled "by those acquainted with 'the common law of the shop'." Sheet Metal Workers v. Aetna Corp., 359 F.2d 1 (1st Cir. 1966).

It should be noted that the employers in this dispute are bound through their membership in Metropolitan to the decisions rendered through the administrative machinery for the settlement of jurisdictional disputes, i.e., the National and New York Plans.

Moreover, the employers are "parties to the dispute" and the District Court should not have granted an injunctive remedy, in effect adjudicating the merits of the underlying dispute (including the rights of Metropolitan's employer members), when the employer was not before the District Court. See, Carey v. Westinghouse Electric Corp., 375 U.S. 261, 263-264 (1964); National Labor Relations Board v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956); National Labor Relations Board v. Plasterers' Local Union No. 79, supra; International Hod Carriers Local 33 v. Mason Tenders District Council, 291 F.2d 496 (2d Cir. 1960). The need for the District Court to defer to the established administrative procedures by the parties is obvious: to do otherwise would leave parties to such arbitral agreements at the mercy of those who wish to repudiate their bargains at will.

As was previously noted, Metropolitan has a substantial economic interest in the outcome of this jurisdictional dispute. A change in work assignment will cause employer members of Metropolitan to face severe economic loss, higher wages and costs and lower efficiency and quality of work. Particularly in the building and construction industry where contractors calculate bids on very narrow margins, small cost differences are extremely important. For these reasons, Metropolitan agreed to be bound by the New York Plan yet now finds itself in the anomalous position of being subject to an injunction issued outside of the New York Plan in a forum in which it was

not a party.

Accordingly, the injunctive relief granted by the District Court should be vacated.

CONCLUSION

For all of the foregoing reasons, the Order dated March 12, 1976, signed by Judge Charles M. Metzner of the United States District Court for the Southern District of New York should be reversed. It is respectfully requested that until this appeal can be heard and decided, the Court extend its stay of the District Court's Order.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARY BONARDI, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 64 Jefferson Avenue, Rockville Centre, N. Y. 10570. On April 16, 1976, deponent served the within Amicus Curiae Brief for Metropolitan New York Drywall Contractors Association, Inc. upon the Clerk of the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, N. Y. 10007; Burton H. Hall, Esq., Attorney for plaintiffs, DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974, et al, 401 Broadway, New York, N. Y. 10013; O'DONOGHUE & O'DONOGHUE, ESQS., Attorneys for defendants OPERATIVE PLASTERERS AND CEMENT MASONS'INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, et al., 1912 Sunderland Place, N.W., Washington, D.C. 20036; COHEN, WEISS & SIMON, ESQS., Co-Counsel for Defendants, 605 Third Avenue, New York, N. Y. 10016 and DONALD C. LANZA, ESQ., Attorney for defendant OPERATIVE PLASTERERS LOCAL 60, 75 Bronx River Road, Yonkers, N. Y. 10708, the addresses designated by said attorneys and the Clerk of the Court for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of